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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL E. HIRSCH,
ABRAHAM GREENSPAHN,
JULIAN H. LEVI,
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Attorneys for Respondents.

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STATEMENT OF THE MATTER INVOLVED.

The Statement of the Matter Involved and the Summary in the Petitioner's Application for a Writ of Certiorari, require further clarification.

I.

By Petitioner's own statement, its case is now confined to a single procedural point—how an appeal under the

Chandler Act on a matter of fees and compensation is to be taken. Apparently, Petitioner here concedes that the equities and the merits of the case are thoroughly with the Respondents. Even in the Circuit Court of Appeals, its position was substantially the same:

> "It (the Petitioner) does not seriously dispute the asserted insufficiency of the allowance, but argues that there was not such abuse of discretion as to warrant our disturbing this award" (R. 49).

II.

The creditors' petition for the reorganization of the Albert Dickinson Company filed on June 13, 1934 (R. 1, *et seq.*), the debtor's answer thereto, the subsequent approval of the petition for reorganization (R. 10), the confirmation of the plan of reorganization (R. 16), and the order requiring the filing of petitions for fees and compensation (R. 25), all occurred prior to the effective date of the Chandler Act, which was September 22, 1938. The District Court never made any order declaring the Chandler Act applicable to these proceedings, nor did the Circuit Court of Appeals. No application for such orders was in fact made to either court (R. 49). Petitioner itself when it sought to appeal from the order of the District Court of October 26, 1938 (the order which Respondents also appealed from) filed an application for leave to appeal in the Circuit Court of Appeals on December 5, 1938. This procedure was identical with that followed by Respondents (R. 49).

Petitioner, in quoting from the opinion of the Circuit Court of Appeals denying leave to it to appeal (see petitioner's brief P. 14), ignored the following paragraph in the opinion of the Court:

"If there were any doubt in this respect, however, there is nothing in the petition or assignment of errors which disclosed how or in what manner the court abused its discretion in the fixing and allowance in a reorganization proceeding is to be made in the exercise of discretion by the District Judge, subject to review only when there has been an abuse of such discretion, or an erroneous application of the law. (*In re Tower Bldg. Corp.*, 88 F. (2d) 347). The petition raises no question of law and no showing whatever is made as to any abuse of discretion on the part of the District Court."

III.

Petitioner had full notice of every step taken by Respondent in the course of the appeal. It was served with a copy of the petition for leave to appeal, together with the assignment of errors, at the time that the petition for leave to appeal was filed in the Circuit Court of Appeals (R. 41).

Rule 38 of the Court of Appeals, governing the allowance of discretionary appeals by that Court, provides:

"1. Petitions to this court for leave to appeal from decisions of the District Court in Bankruptcy cases shall be docketed upon the petitioner's making the required deposit for costs and filing an original and three copies of the petition, assignment of errors and brief in support of petition together with proof of service on respondent of copy of each, and with notice of date of filing.

"2. What Petition Shall Contain. The petition shall set forth the facts under oath which shall contain a brief history of the proceedings in the District Court; all important dates; the amount of the indebt-

edness; the estimated value of the assets; the amount and status of the claims of the creditors who are petitioning for permission to appeal; a statement showing when such creditors acquired their claims, whether before or after bankruptcy proceedings were instituted; a copy of any order or memorandum of views announced by the District Judge. The respondent may file an answer and if so it must be under oath setting forth any pertinent facts which bear upon the exercise of a wise discretion on the part of this Court. It may also contain facts, if supported by the record, bearing on petitioner's right to the relief sought. The petition shall be supported by an original typewritten brief, an original and three copies of which shall be filed with the Clerk which shall set forth the statute and decisions as well as other reasons why the petition should be allowed. Unless permitted by this court, only those who are parties in the District Court may file briefs in this court.

"3. Respondent may support its answer by a brief of which he shall file an original and three copies within five days from the filing date designated in said notice, together with proof of service of a copy on petitioner. Briefs in support of or in opposition to such application need not be printed.

"4. The matter shall then be submitted to the court by the clerk. No oral argument by counsel will be heard unless requested by the court."

Petitioners here did not comply with the rule and filed no brief or answer in opposition to the allowance of the appeal by the Court of Appeals, and on December 13, 1938, after the expiration of the time within which Petitioners might have answered the petition for leave to

appeal, the Circuit Court of Appeals allowed Respondents' appeal (R. 42).

Thereafter, Respondents filed their appeal bond as required by the order allowing the appeal (R. 42), which bond was approved by the court, and citation served upon Petitioner (R. 42).

The events above described were not the only notice which Petitioner received about the progress of the appeal. Mr. Walter A. Wade, who has acted as one of the counsel for Petitioner here and throughout the appeal in the Circuit Court of Appeals, was himself a member of the Bondholders' Committee, the Respondent here.

SUMMARY OF ARGUMENT.

Respondents contend that the construction of Section 250 of the Chandler Act (52 Stat. at L. 901; 11 U. S. C. A. 650) adopted by the Circuit Court of Appeals in this case was wholly right within the purview of the statute and in accordance with the intention of Congress. Section 250 is exclusive and requires that appeals from orders making or refusing to make allowances for fees and compensation in reorganization matters are allowable only in the discretion of the Circuit Court of Appeals.

Respondents further contend that in the face of the admitted equities in this record and the fact that the petition for reorganization was approved more than three months prior to the effective date of the Chandler Act that Act cannot and should not be applied to this proceeding if the result of such application would be to deprive Respondents of their remedy against an admitted wrong and injustice.

Respondents further contend that they have substantially complied with Rule 73 of the Rules of Civil Procedure (28 U. S. C. A. following Sec. 723c), which would govern the practice required to be taken by them in the event that the Petitioner here were right in that (1) the Chandler Act governed these proceedings, and (2) under that Act, contrary to the construction adopted by the Circuit Court of Appeals, this appeal could have been taken only as of right.

ARGUMENT.

I.

The Chandler Act invests the Circuit Court of Appeals with jurisdiction to allow an appeal from an order of the Bankruptcy Court allowing or refusing to allow compensation in proceedings for the reorganization of a corporation irrespective of the amount involved.

Petitioner argues that Section 250 of the Chandler Act does not govern the right to an appeal on a fee question in a reorganization proceeding, but that Sections 24(a) and (b) (52 Stat. at L. 854; 11 U. S. C. A. Sec. 47) and 25 (52 Stat. at L. 855; 11 U. S. C. A. Sec. 48) of the General Provisions of the Act governing appeals apply. It reaches this conclusion by assuming that Section 250 is substantially a re-enactment of Sub-section (c) (9) of Section 77(b) (48 Stat. at L. 912; 11 U. S. C. A. 207 (c) (9)). (See Petitioner's Brief, Page 16) This is not the case. Sub-section (c) (9) of Section 77(b) reads as follows:

> "(c). Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, * * * (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders, and the attorneys

or agents of any of the foregoing and of the debtor, but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily; * * *."

Sections 250 (11 U. S. C. A. Sec. 650) of the Chandler Act reads as follows:

> "Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be **taken to and allowed by** the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers." (emphasis supplied)

Certain important distinctions at once appear, therefore, between Sub-section (c) (9) of Section 77(b) and Section 250 of the Chandler Act:

(1) Section 250 of the Chandler Act is a section which deals with appeals from fee allowances in reorganization proceedings and solely with that question. Sub-section (c) (9) of Section 77(b) provides for the allowance of fees and deals only with the question of appeals by providing that appeals on fees may be heard independently of other appeals.

Shulman v. *Wilson-Sheridan*, 301 U. S. 172.
3 Gerdes, Corporate Reorganizations under Section 77(b) of the Bankruptcy Act (1936), Sec. 1207.

(2) The Circuit Court of Appeals, in holding that Section 250 governed the allowance of the appeal, followed

the express language of Section 250, which provides that the appeal should be "taken to and allowed by" the Circuit Court of Appeals. It must be noted that the words "and allowed by" were inserted by Congress in Section 250 of the Chandler Act and do not appear in Sub-section (c) (9) of Section 77(b), which merely states that the appeal might be "taken to" the Circuit Court of Appeals.

The intention of Congress in inserting the words "and allowed by" in the statute is at once apparent upon an examination of the Chandler Act. Congress knew that in its revision of Sections 24(a) and (b) and 25 of the old Bankruptcy Act, it was abolishing the distinction between appeals in "proceedings" and those in "controversies" in bankruptcy, and that appeals on fees might follow as of right. This Court, however, in *Shulman* v. *Wilson-Sheridan, supra,* had laid down the rule that appeals on fees might not be taken as of right, but only in the discretion of the Circuit Court of Appeals. That rule had been most satisfactory in operation in enabling Circuit Courts of Appeal to reduce the number of unwarranted appeals on the question of the allowance of fees, and it was with this in view that the words "and allowed by" were inserted in the statute.

Petitioner, in an effort to meet the plain language of the statute, has argued that the words "taken to" were inserted in Section 250 for the purpose of providing that appeals involving $500 or more should be as of right. (Petitioner's Brief, Page 15) In other words, Petitioner contends that the words "taken to" in describing an appeal mean that such an appeal must be taken as of right. However, this Court in *Shulman* v. *Wilson-Sheridan, supra,* in passing on Sub-section (c) (9) of Section 77(b), in which the words "taken to" appeared, held that these words did not create an appeal as of right.

No explanation has been made by petitioner as to what the meaning of the words "allowed by the Circuit Court of Appeals" in Section 250 of the Chandler Act could be, other than the plain meaning which the Circuit Court of Appeals in its opinion gave to them, *i. e.*, that the Court should, in its discretion, allow the appeal. (R 51, 58, 59)

Petitioner also contends that the words "in the manner and within the time provided for appeals by this Act" mean that the allowance of appeals upon fee questions must be under Section 24(a) and (b) of the Chandler Act, but here, as the Circuit Court of Appeals observed, the maxim of *generalia specialibus non derogant* controls. The words "and allowed by" appearing in Section 250 of the Chandler Act are the specific mandate of Congress to the effect that an appeal from an order making or refusing to make an allowance of compensation or reimbursement in a reorganization proceeding must be allowed within the discretion of the Circuit Court of Appeals.

The construction of Section 250 adopted by the Circuit Court of Appeals is in accord with sound practice and policy. An appeal on fees, as indicated by the opinion of the Circuit Court of Appeals which Petitioner itself does not attack, primarily involves questions concerning the proper exercise of discretion by the trial court. In many circumstances, an appeal will not lie from an order which is discretionary in the trial court.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131.

In Re Gelino's, (C. C. A., 7th Cir.) 51 F. (2d) 875, and cases cited at Page 877. Cert. denied 284 U. S. 659.

It is therefore only by virtue of the statute that an appeal can be taken from the allowance or disallowance

of fees. Sound policy determines, as the Circuit Court of Appeals here decided, that the right to such appeal should rest within the wise discretion of the Circuit Court of Appeals. The Circuit Court of Appeals in this case aptly stated the reasons for this policy in its opinion (R. 58, 59):

> "In reaching our conclusion we were guided by what we believed to be the intention of Congress in enacting the bankruptcy legislation, namely, the desire to expeditiously administer the estates of insolvents. The more recent amendments to the general bankruptcy act, which for the purpose of convenience might be called the reorganization provisions as distinguished from the liquidation sections of the old act, should be similarly construed. Expedition in the reorganization of a debtor is as essential for the protection of creditors as is expedition in liquidations under the old bankruptcy act.
>
> "One of the possible methods of delay is through appeals. While the right to apply for an appeal in bankruptcy cases may be as important as in other suits, experience has demonstrated that there is a possibility for the misuse of the said right of appeal where reorganization of a debtor with many creditors holding valuable assets is about to be effected. Such a situation affords unusual opportunities for one avariciously inclined to create a nuisance value for a claim otherwise lacking in merit.
>
> "In other words, appeals may tie up the liquidation of the estate or the reorganization of the debtor, although the amount involved is relatively small.
>
> "It seems, for this reason, Congress has, in the old act as well as in the amended act, guarded against abuse by providing that the right of appeal shall not

be an absolute one but, in some cases, allowable only in the discretion of the court of appeals.

"Section 250 of the Chandler Act carries such an intention on the part of Congress. In construing this section, it is significant, first, that it deals specifically and exclusively with appeals taken from orders allowing compensation or reimbursements, and second, that it provides expressly for limitation of time within which the appeal may be taken and it also provides that such appeals 'be taken to *and allowed by the Circuit Court of Appeals* independently of other appeals in proceedings and shall be summarily heard upon the original papers.' In other words, Congress, by this section, was dealing specifically with the subject of appeals from an order allowing compensation to those who had helped in the reorganization of the debtor. The last clause squarely indicates the necessity of prompt disposition of the appeal. The clause 'allowed by the Circuit Court of Appeals' can not be ignored. It suggests an intent to avoid frivolous appeals and appeals for purpose of delay. It necessitates the exercise of a discretion by the Circuit Court of Appeals to the end that delays may be avoided. At the same time, it protects the rights of those who are sincerely convinced that an allowance was either inadequate or extravagant. Dealing as it does, specifically with this subject matter, it should be construed as exclusive."

Through the wise exercise of the discretion plainly given to the Circuit Court of Appeals by the statute, that Court can, in unwarranted cases, prevent delay of an appeal by refusing to hear it. The construction of the statute urged by Petitioner not only thwarts the plain intention of Congress, but would, in effect, permit any fee claimant in a bankruptcy case to delay the closing of the estate and to

delay the distribution of the proceeds either in liquidation or reorganization by taking an appeal as of right irrespective of the soundness of his grounds for reversal.

For these reasons, since Section 250 as construed by the Court of Appeals in this case relates only to appeals on questions of fees, the case of *In Re Winton Shirt Corporation*, (C. C. A., 3rd Cir.) 104 F. (2d) 777 cited by Petitioner, is not in conflict with the decision in this case. That case involved an appeal from an order refusing to furnish a transcript and had nothing to do with an appeal involving fees and compensation, which would be governed exclusively by Section 250.

The decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *England* v. *Ducasse*, 104 F. (2d) 760, cited by Petitioner, is likewise not in conflict. That case involved a dispute over a claim, not a dispute over fees, and Section 250 was neither considered by the court nor involved.

The decision of the Circuit Court of Appeals of the Seventh Circuit in the case of *In Re Dickinson Co.*, No. 6822, described by Petitioner in its Brief on Page 14, is likewise not in conflict. It will be observed from the quotation of the opinion of the court made on Page 3 of this brief, that the motion for leave to appeal was there denied on discretionary grounds.

Petitioner also argues that the Circuit Court of Appeals for the Seventh Circuit in the case of *In Re Dickinson Co.*, No. 6842, apparently should have dismissed the appeal there taken rather than affirm it. This Court itself, however, has on a previous occasion indicated that certiorari will not be granted where the only result of so doing would be to direct a Circuit Court of Appeals to dismiss an appeal instead of affirming it.

Smith, et al. v. *Vulcan Iron Works*, 165 U. S. 518.

The case of *London* v. *O'Dougherty*, (C. C. A., 2nd Cir.) 102 F. (2d) 524, also relied upon by Petitioner, will be discussed under a succeeding section of this argument.

II.

The Chandler Act cannot be applied to these proceedings if the result of so doing would be to destroy Respondents' remedy.

Respondents are not here limited to only those grounds selected by the Circuit Court of Appeals in its opinion to sustain its decision.

Helvering v. *Gowran*, 302 U. S. 238, 245.
Alpha Steamship Corp. v. *Cain*, 281 U. S. 642.

Respondents contended in the Circuit Court of Appeals and do here contend that the Chandler Act should not be applied to these proceedings if the effect of such application would be to deny them the right of appeal.

Everything of significance in the proceedings in the District Court occurred under Section 77(b) of Chapter VIII of the Bankruptcy Act of 1898, as amended, and not under the Chandler Act. The filing of the petition for reorganization, the approval of the petition for reorganization, the presentation of the plan of reorganization and its confirmation by the District Court, and the filing of petitions for the allowance of fees were all controlled by and taken under Section 77(b).

The practice followed by Respondents in pursuing their appeal was the exact practice approved by this Court in *Shulman* v. *Wilson-Sheridan*, *supra*, where this Court held that an appeal from an order concerning fees in a pro-

ceeding under Section 77(b) can be taken only by leave of the Court of Appeals. That procedure was followed not only by these Respondents, but by the Petitioner itself. (R. 49)

The Chandler Act which became effective on September 22, 1938 contained the following provisions with respect to its application to pending proceedings under Section 77(b) (52 Stat. at L. 905; 11 U. S. C. A. Sec. 676):

> "Section 276. PROCEEDINGS TO WHICH CHAPTER APPLIES.—
>
> "* * * c. the provisions of sections 206 and 207 of chapter 8, as amended, of this article, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—
>
> "(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and
>
> "(2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable; and"

The record in this case shows that the petition for reorganization of The Albert Dickinson Company was approved on September 10, 1934, which, of course, is more than three months prior to the effective date of the Act. (R. 10) The District Court never made any order applying the provisions of the Chandler Act to these proceedings, nor was such an order requested by any one. (R. 49)

Sub-section 2 of Section 276(c), above quoted, provides for the application of the Act to the extent that the judge shall deem its application practicable, and hence speaks of the District Court rather than the Circuit Court of Appeals, which acts through three judges as a court rather than through any single justice. Accordingly, if the application of the Chandler Act is dependent upon the section above quoted, the Act does not apply in this case because of the fact that the District judge never made an order applying the Act to these proceedings.

Petitioner argues further, however, that Section 6(b) of the Amendatory Act (52 Stat. at L. 940) should govern. That Section provides:

> "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this Amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898, and the Acts amendatory thereof and supplementary thereto."

Petitioner by urging that this Section of the law applies to a proceeding under Section 77(b) ignores the first clause of Section 6(b): "except as otherwise provided in this amendatory Act", because Section 276(c), *supra*, is the specific provision governing the application of the Chandler Act to proceedings pending under Section 77(b) at the time of the effective date of the Act. (R. 51)

Petitioner is in further error when it argues that the effect of Section 6(b) is automatically to repeal all provisions of the prior law regarding Appellate proceedings (see Petitioner's brief, page 12). The rule is rather that

under either Section 6(b) or Section 276(c) the test of the application of the Chandler Act is whether it is "practicable" to apply the Act. Petitioner assumes that the word "practicable" used in these circumstances means "possible".

The word "practicable" used in these circumstances does not mean "possible". It means rather "feasible," "fair" and "convenient". The Circuit Court of Appeals for the Third Circuit, in construing the use of this word in connection with the Chandler Act, said (*In re Philadelphia & Reading Coal & Iron Co.*, (C. C. A. 3rd Cir) 104 F. (2d) 126):

> "Practicable, as used in the act, is not synonymous with possible, but means feasible, fair and convenient."

This construction was also adopted by the Circuit Court of Appeals of the Seventh Circuit in the case of *In Re Kenilworth Building Corporation*, 105 F. (2d) 673, at Page 676.

Such a construction was adopted in connection with the amendment to the Bankruptcy Act in 1926. *In re John C. Gasteiger & Co.*, (C. C. A. 2nd Cir.) 25 F. (2) 642:

> "The act of 1926 is an innovation in bankruptcy legislation, the amendments of 1903 (section 18 (11 USCA Sec. 41)) and of 1910 (section 14 (11 USCA Sec. 32)) being both expressly made prospective only. The canon is well settled which interprets statutes prospectively unless the language admits of no other construction (*Chew Heong* v. *U. S.*, 112 U. S.536, 559, 5 S. Ct. 255, 28 L. Ed. 770; *Schwab* v. *Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454; *Fullerton Co.* v. *Northern Pacific R. Co.*, 266 U. S. 435, 45 S. Ct. 143, 69 L. Ed. 367), and we are not sure that the clause, 'so far as practicable and applicable,'

means to go further than to make the amendments 'applicable' to pending proceedings in matters of procedure, though perhaps it may. Even if it does, it gives the courts a wide discretion in determining when it is 'practicable' so to apply it, and by 'practicable' we understand that we must decide whether it *is just to disturb vested rights.*

"• • • The repugnance of most people to such changes in front does not arise alone from the fact that they may disrupt settlements made on the faith of the earlier assurance: The mere inconstancy of a sovereign in respect of what has once been granted is itself a grievance, and seems an injustice to most men. For these reasons it seems to us that it is not 'practicable' to apply retroactively section 64 (b) (7) to cases where the claims have all been filed and the rights all fixed." (Emphasis supplied.)

See also the statement of Judge Learned Hand, *In re Inland Dredging Corporation*, (C. C. A. 2nd Cir.), 61 F. (2d) 765, at 766:

"It has crystallized in the theorem that changes may be made in the remedy, so long as they do not affect the right."

This Court, in promulgating the Rules of Civil Procedure, observed the same concern with respect to actions then pending: (Rule 86)

"They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would

not be feasible or would work injustice, in which event the former procedure applies."

See *Harris* v. *Biszkowicz*, (C. C. A. 8th Cir.), 100 F. (2d) 854.

The General Order of this Court entered on February 13, 1939 promulgating the new General Orders and Rules in Bankruptcy contained the provision:

"It is further ordered that this order shall take effect on Monday, February 13, 1939, and shall govern all proceedings then pending to which its provisions are applicable, except to the extent that in the opinion of the court its application to such proceedings would not be practicable or would work injustice, in which event the General Orders and Forms in Bankruptcy heretofore established shall apply: * * *." 11 U. S. C. A. 53 (May 1939 Sup. Ed.).

The rule laid down in the case of *London* v. *O'Dougherty*, *supra*, is to the effect that the Circuit Court of Appeals itself under Section 6(b) of the Chandler Act is vested with discretion to determine whether the Chandler Act shall be applied to a particular proceeding. The Court there said:

"If the judge is to act upon the provisions singly, it would be quite impermissible for him to declare when it was practicable to apply Section 250, which relates to appeals to this court: Section 276(c) (2) cannot cover appeals. We therefore turn to Section 6(b) of the Chandler Act itself, which declares to what proceedings the amendments as a whole are applicable. That indeed is in substantially the same terms as Section 276(c) (2), except that the determination is now ours, not the bankruptcy court's."

In that case there was no showing of any kind that the application of the Chandler Act would injure the appellant at all. In the case at bar, the situation is much different. Petitioner here admits the injustice meted out to Respondents in the District Court to such an extent that it does not even assign error as to the decision of the Court of Appeals on the merits. The Chandler Act was not even mentioned in these proceedings until January 10, 1939, (R. 43), after Respondents' appeal had been allowed, and the time for any other steps had expired. Furthermore, Petitioner did not comply with Rule 38(c) of the Court of Appeals, which required them, if they wished to oppose the allowance of the appeal, to take steps within five days after the notice for leave to appeal was served upon them on November 26, 1938. (R. 41).

This is the distinction between the situation in *London* v. *O'Dougherty, supra,* where the ruling of the Circuit Court of Appeals on the applicability of the Chandler Act was on a motion for leave to appeal, as distinguished from the present case, where the mention of the statute came after the allowance of the appeal and after the time for Respondents to proceed further had expired. If application of the Chandler Act to these proceedings would now operate to dismiss the appeal, the result would be most unjust and inequitable, particularly when neither the District Court nor the Circuit Court of Appeals, within the time provided for appeals, ever made or was requested to make an order applying the Chandler Act to the proceeding. (R. 49) Until such order was made or requested, Respondents, under the statutes and cases cited, were justified in proceeding under the practice approved by this court in *Shulman* v. *Wilson-Sheridan, supra.*

III.

The steps taken by Respondents were in substantial compliance with the practice required by the Rules of Civil Procedure if the appeal should be taken as of right.

For the purposes of the argument under this section the correctness of both of petitioners' contentions will be assumed, that is, (1) that this appeal is governed by the Chandler Act, and (2) that an appeal on fees involving more than $500 must be taken as of right rather than by leave of the Court of Appeals. Even in these circumstances the appeal was properly taken since the motion of respondent for leave to appeal met all of the requirements for a notice of appeal and should be so treated.

Section 24(b) of the Chandler Act (11 U. S. C. A., Section 47(b)) governs the method of taking an appeal as of right and provides:

> "Such Appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

General Order 36, (11 U. S. C. A. Sec. 53), in Bankruptcy provides:

> "Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States. (28 U. S. C. A. following section 723c.)"

The Rules of Civil Procedure thus made applicable to an appeal in bankruptcy as of right provide (Rule 73):

> "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part

thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal."

The purpose of this rule is simply to require that notice of the appeal be given to the appellee.

The procedure actually carried out by the respondents met and fulfilled every requirement of the rule. The petition for leave to appeal specified that Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee, were taking the appeal, (R. 34); it designated the judgment appealed from (R. 34); it named the court to which the appeal was taken (R. 34); accompanying the petition for leave to appeal, an assignment of errors was provided (R. 40, 41); and full notification was given to and acknowledged by Petitioner herein (R. 41).

Of course, the petition and notice were not filed with the Clerk of the District Court but with the Clerk of the Circuit Court of Appeals. This distinction, however, is particularly meaningless in this case, considering that the District Court itself directed that all of the original papers be assembled by the Clerk of the District Court and by him be transmitted to the Court of Appeals. (R. 33, 34) The result, of course, is that all of the papers in the case, whether in the possession of the District Court Clerk or the Clerk of the Circuit Court of Appeals, are now in the custody of the latter. The steps taken by Respondents, therefore, fulfilled the requirements of the Rules of Civil Procedure, which would have governed if the appeal should have been taken as of right.

A liberal construction of the Rules of Civil Procedure is in accordance with their spirit and intention. In the case of *Crump* v. *Hill* (C. C. A. 5th Cir.), 104 F. (2d) 36, Justice Hutcheson determined that the requirement for a notice of appeal was met in including a waiver of service of notice, and the entry of an appearance even though the actual notice of appeal was not filed. The Court there said:

> "We agree with appellant. It is true that Rule 73 does specifically provide that the only thing necessary to be done to perfect an appeal is to file notice thereof with the Clerk, making it the duty of the Clerk to see that notice thereof is served, and that a literal compliance with the Rule requires timely filing of the notice with the Clerk. The reason for the Rule, however, to set the appeal in motion by mere notice without judicial action, makes it quite clear we think that the appellant, when he procured from appellee and filed her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal, as if he had merely filed the notice of appeal with, and left its service to, the Clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a hawking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

A similar, liberal construction was adopted by the Circuit Court of Appeals for the Third Circuit, in *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. (2d) 83.

In the case of *Martin* v. *Clarke* (C. C. A., 7th Cir.), 105 (2d) 685, the Court said:

> "Rule 73(b) of the Supreme Court, 28 U. S. C. A. following Section 723c, provides that 'The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken.' The object of the notice is merely to advise the opposite party that an appeal has been taken from a specific judgment in a particular case; if the notice is plain and explicit in this particular and sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment. Sections 472, 473, 3 Am. Jur. pp. 168 and 169. Courts are liberal in construing the sufficiency of a notice of appeal, and, where it appears from the notice, as in the instant case, that there is sufficient information acquainting appellee as to the judgment appealed from (the appellee not being prejudiced or misled) the mere fact that the designation of plaintiff and defendant was interchanged is no ground for dismissing the appeal. Accordingly, the motion to dismiss is overruled."

In *Siegel* v. *Margiotta* (C. C. A., 2nd Cir), 102 Fed. (2d) 525, the court held that the notice of a motion for leave to appeal was the equivalent of a notice of appeal, saying:

> "The question is whether the appeal papers were served in season, assuming, as we do, that the notice of motion may be taken as the equivalent of a notice of appeal, since no leave was necessary."

If the notice for leave to appeal served by Respondents on November 26, 1938 is likewise taken as the equivalent of a notice of appeal (R. 41), no question exists in this case even under Petitioner's own theory.

CONCLUSION.

The Petitioner here, as in the Circuit Court of Appeals, does not challenge the essential equity and justice of Respondents' position. Their right to an increased allowance is apparently conceded here.

Instead, Petitioner attempts, on a purely technical ground, to defeat an admitted right and promote an admitted error and wrong.

The construction of Section 250 of the Chandler Act urged by Petitioner is contrary to the very language of the statute. Petitioner urges that the Chandler Act be applied to these proceedings retroactively and in circumstances which would work injustice and hardship.

Even if Petitioner's position were sustained on all counts, what was done by Respondents in seeking and perfecting their appeal was a substantial and complete compliance with the requirements of the Rules of Civil Procedure which would then govern the appeal.

It is respectfully submitted, therefore, that the petition for a writ of certiorari be denied.

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